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NOTE AND COMMENT

THE LIABILITY OF CHARITABLE CORPORATIONS FOR THE TORTS OF THEIR SERVANTS.—This question was discussed quite fully in the last number of the REVIEW, pp. 552-559, under the title *Liability of Hospitals for the Negligence of their Physicians and Nurses,* particular attention being given to the reasons underlying the doctrine that charitable corporations are not liable for the negligence of their servants, provided proper care has been exercised in their selection, and to the limitations within which that doctrine should be confined. It was concluded that the true reason for the doctrine is not to be found, as many cases apparently hold, in the inviolability of trust funds, or, as some hold, in the exercise of a sound public policy, but rather in the contract relation which those who receive the benefits of the charity occupy toward such funds, and that the doctrine should be limited in its application to those who have expressly contracted that they will not hold the corporation liable for the negligence of its servants and those who, by accepting the benefits of the charity, impliedly contract that they will not, provided proper care has been exercised in the selection of such servants. Among the cases cited in

support of the proposition that public charities are not liable for the negligence of servants on account of the inviolability of trust funds was that of *Downes* v. *Harper Hospital,* 101 Mich. 555, 60 N. W. Rep. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427. Apparently this case stood for that doctrine. At all events, it had been frequently cited as authority for the doctrine. But in the recent case of *Bruce* v. *Central Methodist Episcopal Church,* decided by the Michigan Supreme Court, March 5, 1907, and reported in 110 N. W. Rep. 951, the *Downes Case* is distinguished and its apparent doctrine materially limited. The writer of the note in the last number of the REVIEW had not, at the time of its preparation, seen the case of *Bruce* v. *Central Methodist Episcopal Church,* and did not have the advantage of the excellent opinions filed therein, but it is quite apparent that they were inspired by the exhaustive opinion that inspired the note, namely, that of JUDGE LOWELL in *Powers* v. *Massachusetts Homœopathic Hospital,* 47 C. C. A. 122, 109 Fed. Rep. 294, 65 L. R. A. 372.

In *Bruce* v. *Central Methodist Episcopal Church,* plaintiff brought his action for injuries received while he was at work for a contractor tinting the ceiling of defendant's church edifice, the injury being caused by the breaking of a scaffolding furnished by defendant and which was defective owing to defendant's negligence. It was claimed that the defendant was a public charitable organization and that, under the doctrine of the *Downes Case,* its funds could not be used to satisfy a judgment for the negligent acts of its servants. While recognizing defendant as a charitable organization and that it is the law that the funds of such an organization cannot be used ordinarily for purposes other than those contemplated by the founders, the court maintained that the immunity was limited to the cases of those who had been beneficiaries of the charity, the reason of the limitation being that when such parties accept the benefits of the charity, they enter into a relation by which they impliedly contract that they will assume the risks arising from the negligence of the servants of the charity, if due care has been exercised in the selection of such servants.

Commenting upon the *Downes Case,* JUSTICE CARPENTER in his opinion says: "There is this distinction between *Downes* v. *Harper Hospital* and this case, viz.: in the *Downes Case* plaintiff was a patient in defendant's hospital and, therefore, a beneficiary of the charitable trust administered by the hospital corporation, while in this case, he was an employee of defendant's contractor, and not a beneficiary of the trust administered by defendant. If we hold that the principle of the *Downes Case* applies to the case at bar, we must declare that that principle exempts a corporation administering a charitable trust from all liability for the torts of its agents, and as a corporation can act only by and through its agents, that it is exempt from all liability whatsoever for torts. What is the principle underlying the *Downes Case?* Does it exempt a corporation administering a charitable trust from all liability for torts? Those who answer this question in the affirmative cannot support their position by appealing to the reasoning of the opinion in that case. While that opinion says, 'the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed

in its execution,' the pith of its reasoning in my judgment is contained in the following words: 'It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employes, though such acts result in damages to an innocent *beneficiary*. Those voluntarily accepting the benefit of the charity accept it upon this condition.'"

JUSTICE CARPENTER then proceeds to determine the true principle underlying the *Downes Case*, and after citing numerous authorities, continues:

"In the latest of these cases (*Powers* v. *Mass. Homœopathic Hospital*) the opinion is exhaustive and elaborate and discusses nearly all authorities—it is held that the ground upon which liability is denied is that of assumed risk, the court saying: 'One who accepts the benefit of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate if the benefactor has used due care in selecting those servants.' If this is correct it is scarcely necessary to say that that principle has no application to the case at bar. Is it correct?

"The ground upon which liability is denied in nearly all the foregoing cases is that stated in the *Downes Case*, viz.: that it would thwart the purpose of the trust; that is, it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's torts. It is entirely logical to say that this will must be recognized by beneficiaries of the trust. It may justly be said that the benefit of the trust is extended to them and accepted by them upon the implied condition that they shall recognize that will. By becoming beneficiaries they agree to recognize it. But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by the general laws, and the duty of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative and not to the judicial department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity. * * * * * * * * * *

"I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot, therefore claim exemption from responsibility for the torts

of their agents, unless that claim is based on a contract with the person injured by such a tort, and that *Downes* v. *Harper Hospital,* and other similar cases are consistent with this rule. They rest upon the principle correctly stated in *Powers* v. *Mass. Homœopathic Hospital, supra,* viz.: that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in *Powers* v. *Mass. Homœopathic Hospital.* The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation."

The holding of the court in this case, resulting, as it does, in the limitation of the apparent doctrine of the *Downes Case,* is undoubtedly correct. The case defines and limits, in a clear and unmistakable way, the immunity of charities for the negligent acts of agents and servants. H. B. H.

THE POWERS OF GENERAL AND SPECIAL AGENTS.—The rule that one dealing with a general agent is not bound by limitations on the authority of such agent of which he does not know, was recently applied in the case of *Western Union Telegraph Co.* v. *Heathcote* (Ala.), 43 So. Rep. 117. A telegraph message was delayed, but the sendee of the message, plaintiff in the action, did not, as the rules of the company required, make claim for damages in writing within 60 days after the message was delivered for transmission. Plaintiff claimed that the local agent in charge of the business of the company in Birmingham had been orally notified, and that he had waived written notice. Defendant denied this, and insisted that in any case such agent had no authority to waive their rule requiring written notice. For other errors the case was sent back for new trial, but on this point the court held that as the agent was the general agent of defendants, and as there was no evidence that plaintiff, or her agent, knew of any limitation imposed by defendant on his authority, it would follow that on proof of a waiver by the agent defendant would be bound by his acts in this respect.

A distinction is taken in many of the cases between a general and a special agent, and the rule is laid down that the acts of a general agent, in all matters within the proper and legitimate scope of the business, bind the principal notwithstanding any secret limitations the principal may have imposed. In the case of a special agent, however, it is said that if he exceeds the authority given, the principal will not be bound. *Towle* v. *Leavitt,* 23 N. H. 360, 55 Am. Dec. 195, and cases cited, *Maryland Casualty Co.* v. *Peoples,* 26 Pa. Super. Ct. 142; *Sullivan* v. *Jahren* (Kan.), 79 Pac. Rep. 1071; *Schenck* v. *Griffith* (Ark.), 86 S. W. 850; *Loudon Savings Fund Society* v. *Hagerstown Savings Bank,* 36 Pa. St. 371. It is the purpose of this note to inquire whether this is a well founded distinction.

The cases are not agreed as to the definitions of general and special agents. While some definitions of a general agent give him a much broader authority than do others, yet there is substantial agreement that a general agent is one having authority to transact the business generally of his principal, or more often, the business of his principal of a particular kind, or in a partic-